No. 10,378

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MONTGOMERY WARD & Co.
(a corporation),
Appellant,

vs.

CHESTER A. LAMBERSON and LYDIA LAMBERSON,
Appellees.

Upon Appeal from the Judgment of the District Court of the United States for the District of Idaho, Eastern Division.

APPELLANT'S CLOSING BRIEF.

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I.

Answering appellees' first argument which challenges appellant's right to cite Idaho case and statute law as a test of the adequacy of the complaint herein, it is sufficient to quote the Conformity Act of 1872, 28 U.S.C.A. 274:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of

the State within which such district courts are held, any rule of the court to the contrary notwithstanding."

Congress did not in terms abolish the Conformity Act by granting to the Supreme Court the power to prescribe Federal Rules, and repeals by implication are not favored.

Simkins, Federal Practice, page 5;
United States v. Jackson, 302 U. S. 628, 58 S. Ct. 390.

A comparison of Section 5-605 of the Idaho Code and Rule 8(a) of the Federal Rules of Civil Procedure will show that they are not inconsistent.

Section 5-605 of the Idaho Code provides:

"Contents of the Complaint: The complaint must contain:

2. A statement of the facts constituting the cause of action in ordinary and concise language."

While Section 8(a) of the Federal Rules provides:

"Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter claim, cross-claim, or third-party claim, shall contain * * *

(2) A short and plain statement of the claim showing that the pleader is entitled to relief. * * *"

It is apparent, therefore, that the law of Idaho is still applicable as a test of the adequacy of the complaint, since the Federal Rules of Civil Procedure did not repeal or abrogate local rules not inconsistent

with the general rules and in effect at the time of their passage.

Stockton v. Consolidated Feldspar Corporation (D. C. E. D. Tenn. N. D. 1940), 1 F. R. D. 411.

II.

Appellees' second argument and citations of authority in support thereof are based solely upon the premise that "this water was put on this entrance by some employee of the defendant after Mrs. Lamberson entered the store and before she came out." (Appellees' Br. p. 10.) Unless this premise is sound, the entire argument and supporting authorities must fall.

Appellees, in order to establish this premise, have relied upon the testimony of their own witnesses Criddle and Theusen. (Appellees' Br. p. 10.) In order to demonstrate the transparency of the appellees' argument and the fallacy of their contention that water was placed upon the ramp by appellant, it is only necessary to examine the actual testimony of these witnesses.

There is no question but that the two witnesses, Ethel Criddle and Lydia Webb Theusen made substantially the same observations, because they were together on the day of the accident (Tr. p. 102); they entered the store together (Tr. p. 103); both noticed a man sweeping water out of the doorway at that time (Tr. p. 103) and both left the store together. (Tr. p.

104.) Mrs. Criddle was unable to fix the exact time they went into the store and saw the water being swept out except that it was between 3:30 and 4:00 p.m. However, Lydia Webb Theusen fixed the time as definitely after the accident (Tr. p. 116):

"Q. When you and Mrs. Criddle went into the store did you have any difficulty in getting in?

A. We had to kind of stop so as not to get the water splashed on us.

Q. Can you fix the time it was exactly?

A. No, sir, I can't.

Q. Can you tell whether it was before or after Mrs. Lamberson fell?

A. Yes, sir, it was after."

(Tr. p. 117):

"Q. There was someone sweeping it out, you say?

A. Yes, sir.

Q. Can you say whether that was before or after Mrs. Lamberson fell?

A. It was after, according to the time she was there."

It is evident that appellant's precautions taken after the accident in sweeping away any water to prevent a recurrence of such accident were inadmissible to show negligence.

Davidson S. S. Co. v. U. S., 142 F. 315. Aff'd. 27 S. Ct. 480, 205 U. S 187;

Columbia & P. S. R. Co. v. Hawthorne, 12 S. Ct. 591, 144 U. S. 202, 36 L. Ed. 405;

Motey v. Pickle Marble & Granite Co., 74 F. 155;

A. T. & S. F. R. Co. v. Parker, 55 F. 595;
Barber Asphalt Paving Co. v. Odasz, 60 F. 71;
Isaacs v. S. P. Co., 49 F. 797.

The general rule is clear that evidence of a condition existing after an injury is inadmissible to establish the existence of that condition at the time of the injury.

Oklahoma Natural Gas Co. v. Ross (C. C. A. 10th, 1942), 131 F. (2d) 238;
20 *Am. Juris.,* Section 306;
Haddon v. Snellenburg (Pa. 1928), 143 Atl. 8;
Lee v. Meier and Frank Co. (Or. 1941), 114 Pac. (2d) 136;
Midco Oil Co. v. Hull (Okla. 1938), 75 Pac. (2d) 1126.

The Court did not make a finding that appellant or its servants placed water upon the ramp (Tr. pp. 21, 22, 23) and appellees cannot now urge that the judgment is supported by facts which are not in the record and which were not found by the trial Court. The unquestioned rule applicable is that where facts are specially found by the trial Court, the reviewing Court is confined to the facts so found.

5 *Corpus Juris Secundum* 63;
Cole v. Manning, 79 Cal. App. 55, 248 Pac. 1065;
Massaro v. Savoy Estates Realty Co., 148 Atl. 342, 110 Conn. 452;
Norbeck & Nicholson Co. v. Nielsen, 164 N. W. 1033, 39 S. D. 410;

Roberg v. Town of Troy, 163 Atl. 770, 105 Vt. 134;

Elliott v. Kern, 161 N. E. 662, 90 Ind. App. 453.

There is not one word or sentence in the record that would point to appellant or its servants as placing water upon the ramp. In fact, the undisputed evidence shows that the only treatment administered to the area in front of the store was the sweeping of the sidewalk several times during the day. (Tr. p. 131.)

The appellees admit that their contention that appellant's servants placed water upon the ramp is at most an "inference" drawn by the trial Court. (Appellees' Br. p. 14.) A reading of the record will disclose that Hon. Judge Healy did not make such an inference as that contended for by appellees and it follows therefore that appellees' arguments and authorities must fail as having been founded upon an assumed fact which is not supported either by the testimony in the record or the findings of the trial Court.

The Court could only speculate from the evidence before it, as to the origin of the water, if any, upon the ramp and the length of time it had remained upon the ramp prior to the accident. It is just as reasonable to deduce from the record that the water came from snow which dropped from the awning box (Tr. p. 131) as from any other source. And the Court could as well infer that the water, if any, had been present upon the ramp for only a few seconds before the

accident, as that it had remained there for a sufficient period of time to give defendant notice thereof.

There is not an iota of evidence upon these essential facts, which appellees were required to prove by a preponderance of the evidence. The judgment of the trial court rests only upon speculation and conjecture, is unsupported by any evidence and cannot be permitted to stand.

Missouri Pac. R. R. Co. v. Remel, 48 S. W. (2d) 548, 185 Ark. 598, Cert. Den. 53 S. Ct. 85, 287 U. S. 634, 77 L. Ed. 550;

Randleman v. Boeres, 270 Pac. 374, 73 Cal. App. 745;

Clarke v. Blackfoot Water Works, 228 Pac. 326, 39 Ida. 304;

Studebaker Bros. Co. of Utah v. Horbert, 207 Pac. 587, 35 Ida. 490;

Harker v. Seawell, 206 Pac. 812, 35 Ida. 457;

Spencer v. John, 197 Pac. 827, 33 Ida. 717.

The cases cited by appellees (Appellees' Br. p. 15) in support of their argument are not applicable herein for the reason that in all except *Marano v. Jensen,* 49 N. Y. S. 346 (Appellees' Br. p. 15), the obstacles, conditions or instrumentalities causing the injury were proved to have been placed in position by the defendants.

In *Marano v. Jensen,* supra, a memorandum decision without opinion, the snow causing the injury had remained for at least two hours upon the defendants' doorstep. Mrs. Lamberson's own testimony that the

water was not on the ramp when she went into the store distinguishes this case also.

The trial Court found only that "defendant was negligent in allowing said water to be upon and remain upon said ramp or entrance way". (Tr. p. 23.) It did not find that defendant had placed any water thereon, and therefore appellees' arguments and authorities to the effect that the *findings* will not be disturbed on appeal unless unsupported by sufficient evidence, are not applicable herein. Appellant's position is that the trial Court's finding of negligence is without support in the record because there is no evidence of actual knowledge of the presence of the water upon the ramp, and no proof that it remained there for a sufficient length of time to give appellant constructive notice.

Appellees have countered with their own finding, not the Court's, that appellant placed the water upon the ramp. It is submitted that appellant's argument has not been answered, because it cannot be answered. The reason is obvious: There is nothing in the record to provide an answer.

> "The burden of proving defendant's negligence is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant.
>
> * * * * * * *

"Until it is established that the accident was occasioned through the negligence of defendant's employees, or as the result of the existence of a condition of which defendant had either actual or constructive notice, there can be no recovery."

F. W. Woolworth v. Williams (Ct. App. D. C., 1930), 41 F. (2d) 970 at p. 971.

In reversing a judgment for plaintiff the Court further said at page 972:

"No attempt is made to show how or by whom the oil spot was created, nor as to how long it existed; so far as appears, it may have come into existence between the time that plaintiff entered the store and when she started to leave, and may have been caused by some person having no connection whatsoever with defendant.

* * * * * * *

Applying the foregoing well established rules, as to the liability of a storekeeper for the safety of his customers to the case at bar, there is no theory upon which the judgment can be sustained. To uphold this judgment would be equivalent to making the defendant an insurer for the safety of its customers while in its store, and this is not the law."

III.

Appellees have argued that contributory negligence is a question of fact in this case and not a question of law. Appellees have not, however, disputed the fact that the presence of water upon the ramp was an

open, obvious and visible condition which would be apparent to anyone who looked at it. Mrs. Lamberson either did not look where she was going or if she did look she failed to see the water. In either case, she would be guilty of contributory negligence as a matter of law.

> "To say one looked and did not see when there are no obstructions and the view is clear, is so incredible that courts will charge contributory negligence in such a case as a matter of law."
>
> *New York Telephone Co. v. Becker,* 30 F. (2d) 578.

> "The law requires a person to make reasonable use of his faculties to observe and avoid danger, and conclusively presumes that he knows what he would have known, had he made ordinary use of his senses."
>
> *De Honey v. Harding,* 300 F. 696;
>
> *Johnson v. Washington Route Inc.,* 121 Wash. 608, 209 Pac. 1100.

In the cases cited by appellees: *Donovan v. Boise City,* 171 Pac. 670, 31 Ida. 324; *Osier v. The Consumer's Company,* 41 Ida. 268, 239 Pac. 735; *Williamson v. Neitzel,* 45 Ida. 39, 260 Pac. 735; *Giffen v. City of Lewiston,* 6 Ida. 231, 55 Pac. 545; *McKenna v. Gronbaum,* 23 Ida. 46, 190 Pac. 919; *Flach v. Fikes,* 267 Pac. 1079, 204 Cal. 329; and *Davis v. Pacific Power Co.,* 40 Pac. 950, 107 Cal. 563, the lighting conditions were so poor due to inadequate illumination or the time of the day that the plaintiffs involved were not conclusively presumed to have seen the dan-

gers, and therefore contributory negligence was regarded as a question of fact. These cases have no application to the instant case where the sun was shining, the scene was out of doors, and lighting conditions were satisfactory.

The next three cases cited by appellees: *Bennett v. Deaton,* 68 Pac. (2d) 895, 57 Ida. 752; *Adkins v. Zalasky,* 81 Pac. (2d) 643, and *Baldwin v. Mittry,* 102 Pac. (2d) 643, 61 Ida. 427, concern only accidents involving motor vehicles, and for that reason are not conclusive upon the duties of storekeepers and invitees.

IV.

Appellees' last argument, like their second one is based upon a fact not in evidence. On page 3 of appellees' brief, the statement is made that Dr. Cline testified to the *permanent* loss of flexibility and mobility. It is submitted that nowhere in the record is there any mention of *permanent* disability. After having interpreted Dr. Cline's testimony on the percentage of disability to mean the percentage of *permanent* disability, appellees have quoted from the testimony at page 122 of the transcript. The very testimony quoted, however, disproves rather than proves their erroneous interpretation for it shows that Mrs. Lamberson had experienced improvement in the use of her arm, that her condition was not static and that the percentage of disability of the wrist and fingers fixed at 75% was not intended to and in fact did not

describe the percentage of permanent disability: For all that appears, Mrs. Lamberson's condition would continue to improve in the future.

"Q. And further, Doctor, will you look at her arm and wrist?

A. You mean examine her arm now?

Q. Yes.

A. I would say that this is a little difficult to remember, but I would say that the deformity is the same as it was; that the swelling is less; that she has more motion in the fingers than she had at the last examination; that the evidence of arthritic changes are about the same."

(Tr. p. 122.)

It is submitted that neither Dr. Cline nor Mrs. Lamberson testified as to the nature and extent of any *permanent* disability and that Mrs. Lamberson's own testimony with respect to her deformity, her pain and her disability, in so far as it may be designed to prove the percentage of permanent disability invades the field of expert testimony.

It has been heretofore pointed out that the appellees' own statement is incompetent to establish the fact of permanent injury.

The Grecian Monarch (D. C. D. N. J., 1887), 32 F. 635;

Forrest E. Gilmore Co. v. Hurry, 165 Okla. 29, 24 Pac. (2d) 653.

Appellees have contended that appellant cannot now raise the question of the Court's failure to segregate the damages allowed. However, the rule is

clear that wherever an error is apparent on the record, it is open to revision, whether it be made to appear by a bill of exception or in any other manner.

Suydam v. Williamson, 61 U. S. 427, 20 How. 427, 15 L. Ed. 978.

It is respectfully submitted that the judgment of the honorable trial Court cannot stand for the foregoing several reasons, and that the judgment must be reversed.

Dated, Oakland, California,
July 14, 1943.

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